SOAH DOCKET No. 582-09-3322
TCEQ DOCKET No. 2009-0398-IWD

APPLICATION OF OAK GROVE MANAGEMENT COMPANY LLC FOR TPDES PERMIT NO. WQ0001986000	**§ § §**	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

APPLICANT OAK GROVE MANAGEMENT COMPANY LLC'S
MOTION TO STRIKE AND REPLY TO EXCEPTIONS

COMES NOW Oak Grove Management Company LLC ("***Applicant***" or "***Oak Grove***") and files this Motion to Strike and Reply to the Exceptions of Protestants Robertson County: Our Land Our Lives and Roy Henrichson (collectively "***Protestants***") to the Administrative Law Judge's ("***ALJ's***") Proposal for Decision ("***PFD***") and proposed order ("***Proposed Order***") in the above-captioned matter. As explained below, Protestants' Exceptions rely in part on documents outside the record and, to the extent they do, should be stricken. Otherwise, they should be overruled.

Protestants' Exceptions basically restate positions that were briefed extensively by the parties, carefully reviewed and rejected by the ALJ, and addressed in detail in the PFD and Proposed Order. Those positions are: (1) the Primary Discharge Canal is water in the state and should have been subject to Tier 2 antidegredation analysis; (2) Sub-Impoundment A is a perennial water body and should be classified as high aquatic life use; (3) Oak Grove Steam Electric Station ("***OGSES***") is a "new source" that should be subject to the Phase 1 rules implementing Clean Water Act § 316(b) because the construction was not continuous and the intake design flow is being increased; (4) the Lake Limestone intake structure is subject to Clean Water Act § 316(b) and requires a Best Technology Available ("***BTA***") analysis; and (5) the permit is not specific enough to be enforceable. For the most part, the arguments surrounding

these issues have been fully briefed by the parties, and can be resolved by reference to the ALJ's PFD and Proposed Order and Oak Grove's closing briefs (which are incorporated by reference). But, Protestants now rely on a few new approaches, for example extraneous records, parsed regulatory interpretations, and misplaced case law citations, to support their views. Applicant has not previously addressed these new angles now offered by Protestants, and thus does so here.

I.
MOTION TO STRIKE

In an effort to bolster their previously unsuccessful position that Sub-Impoundment A should not be considered intermittent, Protestants rely on and attach to their Exceptions as Attachment D a part of an otherwise unidentified PowerPoint presentation. Although Protestants did go through the motion of making an "offer of proof" regarding Attachment D, that offer was fundamentally flawed and inadequate because the Protestants failed to first offer the document into evidence in this case.[1] And, having failed to do so, the ALJ never ruled on the admissibility of Attachment D. Protestants' offer of proof is thus invalid and no error was preserved.[2] Accordingly, separate from the fact that Attachment D was never authenticated,[3] that document

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[1] Specifically, Protestants cite to and attach portions of a document that was marked during the hearing as Exhibit P-16, but was not admitted into evidence, *as admitted by Protestants*. *See* Exceptions of Protestants Robertson County: Our Land Our Lives and Roy Henrichson at 7 n.14, Att. D [hereinafter "***Protestants' Exceptions***"]; *see also* Trial Tr. at 90:9 to 91:22 (using a document marked as Exhibit P-16 to cross-examine Applicant's witness Jack Thibodeau, but *failing to offer it into evidence*), 825:23 to 826:3 (tendering Exhibit P-16 as an offer of proof).

[2] *See* TEX. R. EVID. 103(a) ("Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, *and* . . . the substance of the evidence was made known to the court *by offer* . . . .") (emphasis added); *Bobbora v. Unitrin Ins. Servs.*, 255 S.W.3d 331, 334-35 (Tex. App.—Dallas 2008, no pet.) ("To preserve error concerning the exclusion of evidence, the complaining party must actually offer the evidence and secure an adverse ruling from the court.").

[3] Moreover, "[a]uthentication is . . . but a condition precedent to admissibility and does not establish admissibility." TEX. R. CIV. P. 193 cmt. 7.

is not and cannot be considered part of the record created in this proceeding.[4] The document labeled Attachment D is not in the record due to Protestants' failure to preserve error,[5] and Oak Grove respectfully requests that Attachment D and the portions of Protestants' Exceptions relying on Attachment D be stricken from the record.

II.
REPLY TO PROTESTANTS' EXCEPTIONS

A. THE PRIMARY DISCHARGE CANAL IS PROPERLY CLASSIFIED

Protestants improperly parse Texas Water Code definitions, TCEQ rules, and case law in an effort to persuade the Commission that a portion of the Oak Grove industrial cooling impoundment, namely the Primary Discharge Canal, should be reclassified as surface water in the state, and that such reclassification should change the outcome of this proceeding. No reclassification of the Primary Discharge Canal is warranted.

Protestants now assert that the Primary Discharge Canal cannot be part of a waste treatment system because it is used for conveyance, and, as such, it must be surface water in the state.[6] They are wrong. "[W]aters in treatment *systems* . . . created for the purpose of waste

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[4] Under Tex. Gov't Code § 2001.060, the record in a contested case includes:

(1) each pleading, motion, and intermediate ruling;

(2) evidence received or considered;

(3) a statement of matters officially noticed;

(4) questions and offers of proof, objections, and rulings on them;

(5) proposed findings and exceptions;

(6) each decision, opinion, or report by the officer presiding at the hearing; and

(7) all staff memoranda or data submitted to or considered by the hearing officer or members of the agency who are involved in making the decision.

[5] "The record in a contested case includes . . . questions and offers of proof, objections, and rulings on them." TEX. GOV'T CODE § 2001.060(4).

[6] *See* Protestants' Exceptions at 4-5.

treatment" are, by definition, not surface water in the state.[7] Although "waste treatment" is not a defined term, "treatment works" is. "Treatment works" are "*systems*" that include "any works . . . used in connection with the treatment process" as well as "facilities to provide for the collection, control, and disposal of heat."[8]

Protestants want the Commission to ignore the "*system*" – the "interacting or interdependent group of items forming a unified whole" or the "group of interacting bodies under the influence of related forces"[9] – and to break the *system* down into isolated components, each which, according to Protestants, must have only a single purpose. But that is not how *systems* operate.

Components of a system work together and, like the Primary Discharge Canal, may perform multiple functions. The Primary Discharge Canal conveys wastewater to Sub-Impoundment A, treats wastewaters by allowing mixing of wastewaters from various sources, and collects, treats, and disposes of heat.[10] The Primary Discharge Canal's multifunctional use in connection with the treatment system is clear from the record.[11] Contrary to Protestants'

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7 30 TEX. ADMIN. CODE § 307.3(57).

8 TEX. WATER CODE § 26.001(24) (emphasis added).

9 WEBSTER'S COLLEGIATE DICTIONARY 1199 (9th ed. 1984), *available at* http://www.merriam-webster.com/dictionary/system (last visited July 7, 2010).

10 *See* Ex. APP-300 at 53:10-14 (Tischler) (testifying that the Primary Discharge Canal serves as a conveyance as well as a component of the OGSES treatment system); Ex. APP-223 at 6-9 (Revised Permit) (noting that the effluent monitoring samples should be taken at the outfall following discharge but "prior to mixing with any other waters in the Primary Discharge Canal").

11 Protestants have also previously recognized the Primary Discharge Canal's multiple functions. *See* Protestants' Closing Argument at 6, Applicant's Response to Closing Arguments at 4 (noting that the Primary Discharge Canal was included in Oak Grove's thermal modeling study, which evaluated *treatment* of the temperature component of Applicant's discharge).

Exceptions, the ALJ got it right. The Primary Discharge Canal, man-made and built as part of the treatment system, is exempt from the definition of surface water in the state.

The ALJ's conclusion that the Primary Discharge Canal is not ***surface*** water in the state also is not in conflict with the court's decision in *Watts*,[12] contrary to Protestants' assertion.[13] First, *Watts* had nothing to do with discharges to ***surface*** water in the state or the application of water quality standards; it was concerned only with water in the state.[14] Second, the canal (or ditch) in *Watts* was described only as a conveyance system.[15] Nothing in the *Watts* opinion suggests that there was treatment in the ditch or that the ditch was a component of a treatment system. There is no different test being applied in the Oak Grove matter. The facts are clear – the Primary Discharge Canal is part of the treatment system at Oak Grove. The law is clear – treatment systems are not ***surface*** waters in the state and only ***surface*** waters are subject to ***surface*** water quality standards and antidegradation review.

B. PROTESTANTS' RELIANCE ON THE *WATERKEEPER* DECISION IS INAPPROPRIATE

Protestants' final exception complains that Other Requirement 18 (regarding the Clean Water Act's § 316(b) provision) violates the Clean Water Act because it incorporates by reference materials that were part of Oak Grove's application.[16] That position is not new,[17] but

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12 *See Watts v. State of Texas*, 140 S.W.3d 860, 862 (Tex. App.—Houston [14th Dist.] 2004, pet ref'd). Like the other issues raised by Protestants, Applicant has previously responded to Protestants' reliance on *Watts* in their closing brief. *See* Protestants' Closing Arguments at 4-5; Applicant's Response to Closing Arguments at 2-3.

13 *See* Protestants' Exceptions at 5.

14 *See Watts*, 140 S.W.3d at 862.

15 *See id.* at 864-65.

16 *See* Protestants' Exceptions at 15-23. In the evidentiary record, the revised permit is Exhibit APP-223.

17 *See* Applicant's Response to Closing Arguments at 33, Protestants' Closing Arguments at 26.

what is new is Protestants' suggestion that the Second Circuit's *Waterkeeper Alliance, Inc. v. USEPA*[18] decision somehow supports the conclusion that incorporation by reference is prohibited by the Clean Water Act.[19] Protestants misconstrue the federal appellate court's holding in *Waterkeeper*, which provides no support for Protestants' Exceptions.

The *Waterkeeper* case concerned a rulemaking proceeding, not a permitting proceeding.[20] The case concerned effluent (i.e., *discharge*) limitations, not cooling water *intake* structures.[21] The documents at issue in *Waterkeeper* were not part of a permit application and were not subject to public review and comment.[22] In contrast, the cooling water intake structure operation and maintenance requirements incorporated by reference in Oak Grove's revised permit are derived from documents that are part of Oak Grove's application; that have been available for public review and comment;[23] and that are already and otherwise incorporated into the revised permit pursuant to Permit Condition No. 10, a standard condition in all TPDES permits issued in Texas.[24] Finally, and most fundamentally, the court in the *Waterkeeper* case did not address the issue of incorporation by reference, because in that case the Environmental Protection Agency

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18 399 F.3d 486, 503 (2d Cir. 2005).

19 *See* Protestants' Exceptions at 15. While this is the first time Protestants cite to the *Waterkeeper* decision in their post-hearing briefs, this is not the first time Protestants have misconstrued the Second Circuit's opinion for the same purpose. *See* Applicant's Response to Protestants' Motion to Remand or Abate at 4-6.

20 *See Waterkeeper*, 399 F.3d at 490.

21 *See id.* at 502.

22 *See id.* at 503.

23 *See* Ex. APP-223 at 22 (Other Requirement 18).

24 Permit Condition No. 10 provides: "The application pursuant to which the permit has been issued is incorporated herein; provided, however, that in the event of a conflict between the provisions of this permit and the application, the provisions of the permit shall control." Ex. APP-223 at 16.

("***EPA***") did not propose to incorporate external materials by reference. Thus, the case is inapposite to this matter.

The *Waterkeeper* case concerned EPA's promulgation of a rule applicable to concentrated animal feeding operations ("***CAFOs***").[25] The rule at issue established non-numerical effluent limitations for CAFOs in the form of best management practices.[26] Among the required best management practices was a requirement that CAFOs develop and implement nutrient management plans.[27] EPA acknowledged that the regulatory requirement to develop and implement a nutrient management plan was itself a non-numerical effluent limitation, but maintained that the terms of the plans did not constitute effluent limitations.[28] Accordingly, EPA took the position in the *Waterkeeper* case that the terms of a nutrient management plan did not need to be included in the discharge permit – either expressly or by reference.[29] EPA did not even propose to incorporate by reference the terms of the plans as permit conditions and, therefore, the Second Circuit did not address the issue of incorporation by reference. Hence, the Second Circuit's decision cannot and does not support the claims that Protestants make in their exceptions.

Protestants attempt in vain to extend the scope of the *Waterkeeper* holding to the facts of this case by contending that *Waterkeeper* stands for the proposition that the cooling water intake structure operation and maintenance requirements incorporated by reference in Oak Grove's Other Requirement 18 are not enforceable effluent limitations. First, that is simply an incorrect

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25 *See Waterkeeper*, 399 F.3d at 502.

26 *See id.*

27 *See id.*

28 *See id.*

29 *See id.*

application of *Waterkeeper*. Second, Protestants' focus on effluent limitations in the context of cooling water intake structure requirements is aimed at the wrong end of the facility's operation. By definition, the cooling water *intake* structure *withdraws* water for cooling purposes.[30] By contrast, effluent limitations concern the *discharge* of water from the facility.[31] Thus, it is neither surprising nor of any significance that Protestants are having difficulty divining enforceable effluent limitations in the incorporated information concerning the operation and maintenance of the facility's cooling water intake structure. There are no effluent limitations applicable to the point of cooling water withdrawal (i.e., the cooling water intake structure). Regardless, in this case, the "plan" is included in the permit; by incorporating the intake structure plan into the permit by reference, the Executive Director's revised permit achieves what the rule in *Waterkeeper* did not.[32]

The court in *Waterkeeper* also vacated this portion of the CAFO rule for another reason – the rule failed to ensure that the public had access to the plan.[33] Regardless of whether nutrient plans were effluent limits, the court concluded that the plans were critical to the proper implementation of the Clean Water Act.[34] Accordingly, it was imperative that the public have

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30 *See* 40 C.F.R. § 125.83 (defining a cooling water intake structure).

31 *See id.* § 122.2 (defining "effluent limitation" as "any restriction imposed . . . on quantities, discharge rates, and concentrations of 'pollutants' which are 'discharged' from 'point sources' into 'waters of the United States'"); *see also id.* (defining the "discharge of a pollutant" as the addition of pollutants into waters of the United States).

32 Other Requirement 18 expressly incorporates by reference the *Supplemental Information for 316(b) Determination* and a *Cooling Water Intake Technology Evaluation for Oak Grove Steam Electric Station*, which were submitted as part of the application. *See* Ex. APP-223 at 22.

33 *See Waterkeeper*, 399 F.3d at 503-04.

34 *See id.*

access to and an opportunity to comment on the plans.[35] Because the CAFO rule did not require the plans to be part of the permit application or permit, the rule, according to the court, "prevent[ed] the public from calling for a hearing about – and then meaningfully commenting on – [discharge] permits before they issue."[36] The court decided that this aspect of the rule was not consistent with the Clean Water Act's mandates regarding public participation.[37]

In Oak Grove's case, as evidenced by the existence of this filing, the public had an opportunity to review the intake structure materials that are referenced in the permit because those materials were specifically submitted as part of Oak Grove's permit application. Contrary to the situation in *Waterkeeper*, here the public could and did comment on the application, the draft permit which referenced the application materials, and the revised permit which also referenced the application materials. The public could and did present evidence on the application materials at a contested case hearing and could and did comment on the outcome of that hearing. Thus, Oak Grove's TPDES application (which specifically includes the referenced materials) and permit pass the *Waterkeeper* test on public participation as well.

One final note on *Waterkeeper*: in response to the Second Circuit's opinion, EPA promulgated revised CAFO rules in November 2008.[38] At that time, EPA expressly provided that it "[wa]s not . . . requiring a single approach whereby the terms are made part of the permit," but instead allowed that "[t]he permitting authority may satisfy this requirement by

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35 *See id.*

36 *Id.* at 503.

37 *See id.*

38 *See* 73 Fed. Reg. 70,418, 70,418 (Nov. 20, 2008).

incorporating a [plan] *by reference* into the permit."[39] These revised rules, which specifically allow incorporation by reference, are currently effective. Accordingly, despite Protestants' assertions otherwise,[40] TCEQ's decision to incorporate by reference into Oak Grove's TPDES permit materials that were part of Oak Grove's application, and that were available for public review, not only does not violate the Clean Water Act, but is also consistent with *Waterkeeper*.

III.
CONCLUSION

For the foregoing reasons, and those set forth in Oak Grove's Closing Argument and Response to Closing Arguments, Applicant Oak Grove respectfully requests that the non-record portions of Protestants' Exceptions be stricken, that Protestants' Exceptions otherwise be rejected, and that the ALJ's Proposed Order be modified as proposed in Oak Grove's Comment Regarding Proposal for Decision and Order (identifying a typographical error in Conclusion of Law No. 23) and issued by the Commission with that modification.

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[39] *Id.* at 70,451 (emphasis added).

[40] *See* Protestants' Exceptions at 21.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing reply has been sent by email, fax, hand delivery, or First Class mail on this day, July 8, 2010, to the following:

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